

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON : 10th MAY, 2016

DECIDED ON : 13th MAY, 2016

+ CRL.A.1401/2013

ARVIND

..... Appellant

Through : Mr.Ashutosh Bhardwaj, Advocate.

VERSUS

THE STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Through : Mr.Amit Gupta, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is a judgment dated 25.09.2013 of learned Addl. Sessions Judge in Sessions Case No.19/13 arising out of FIR No.152/2011 PS Vijay Vihar whereby the appellant – Arvind was held guilty for committing offence punishable under Section 376 IPC. By an order dated 28.09.2013, he was sentenced to undergo RI for ten years with fine ₹10,000/-.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 30.04.2011 at about 12.00 noon at House No.A-1/42, Harsh Dev Park, Budh Vihar, Phase-II, Delhi, the appellant committed rape upon the prosecutrix 'X' (changed name) aged around 14 years against her

will. The incident was reported to the police vide Daily Diary (DD) No.9B (Ex.PW-5/A) at around 02.21 night on the intervening night of 30.04.2011 and 01.05.2011. The investigation was assigned to SI Ramesh Thakur who reached at the spot. After recording victim's statement (Ex.PW-1/A), Investigating Officer lodged First Information Report. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. The accused was arrested. Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against the appellant in the Court. To prove its case, the prosecution examined sixteen witnesses. In 313 Cr.P.C. statement, the appellant denied his complicity in the crime and pleaded false implication. He examined DW-1 (Satpal Singh), DW-2 (Keshav Dev Sharma) & DW-3 (Laxmi) in defence. The trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. I have heard the learned counsel for the parties and have examined the file. Admitted position is that the appellant's sister Poonam lived in the adjacent house of the prosecutrix. The appellant used to visit his sister's residence. The prosecutrix herself admitted that the appellant was acquainted with her for the last about one month and he used to visit his sister's house.

4. Appellant's conviction is primarily based upon the solitary statement of the prosecutrix 'X'. Needless to say, conviction can be based upon the sole testimony of the prosecutrix provided it lends assurance of her testimony. In case the Court has reasons not to accept the version of the prosecutrix on its face value, it may look for corroboration.

5. In the instant case, number of discrepancies and inconsistencies have emerged on record to sustain conviction on the sole testimony of the prosecutrix without seeking independent corroboration. The occurrence had taken place at around 12.00 noon on 30.04.2011. The incident, however, was reported to the police at around 02.21 a.m. on the night intervening 30.04.2011 and 01.05.2011. The delay in lodging the FIR has not been properly explained. Undoubtedly, the FIR was lodged after due consultation with the victim's uncle Upender and 'Bua' Sunita .

6. In her complaint (Ex.PW-1/A), the prosecutrix implicated the appellant for committing rape upon her inside the house where he had gained entry through the roof from the adjoining house of his sister. She gave detailed account as to how and in what manner, the accused disrobed her after putting off his clothes and established physical relations against her wishes despite her objecting to it. She further disclosed that she was alone in the house at the time and her mother and brother had gone to their maternal uncle's house. Her father had gone to see them off at Rithala Metro Station at around 07.30 a.m. She further disclosed that when her father returned at around 10.00 p.m. she apprised the incident to him and the matter was reported to the police. In her 164 Cr.P.C. statement (Ex.PW-1/B) and in her Court statement also as PW-1, she implicated the accused as the perpetrator of the crime and reiterated her version.

7. The initial information conveyed to the police vide DD No.9B (Ex.PW-5/A) was that at House No.A-1/42, Harsh Dev Park, Budh Vihar, Phase-II, Delhi, three 'known' boys had gagged mouth of a girl and had fled away. In the cross-examination, the prosecutrix admitted that she had told the PCR that three boys had come who had pressed her mouth and had fled

the spot. She further admitted that she had informed the PCR officials that she knew those three boys but had not disclosed their names and addresses. The prosecution has failed to explain as to who those three assailants were and what were their names. It is unclear as to what role was played by the three assailants and why the prosecutrix and her family members did not implicate them despite having known to them. The Investigating Agency did not investigate their role in the episode. Their identity could not be established. It was not elaborated as to when the three boys had entered inside the house and why they had pressed X's mouth. It is also not clear as to how they had gained entry inside the house. In her statement (Ex.PW-1/A), the prosecutrix maintained complete silence and did not disclose to the Investigating Officer if the three individuals had pressed her mouth.

8. Another glaring feature which has gone unnoticed by the Trial Court is the MLC (Ex.PW-8/A) prepared at Dr.Baba Saheb Ambedkar Hospital, Rohini, where the prosecutrix was medically examined on 01.05.2011 at 05.20 a.m. In the alleged history recorded therein it finds mention that the prosecutrix was sexually assaulted by a boy named Arvind (the appellant) living in her neighbourhood with the help of another boy named Gaurav. This alleged history was narrated by the victim herself to the doctor. It further records that the prosecutrix was having history of sexual assault previously by a boy named Gaurav on 15.08.2010. The Investigating Agency did not ascertain the role played by Gaurav. The victim in her statements before the Investigating Officer or before the Court did not assign any specific or definite role to Gaurav in the incident. She concealed the factum of having physical relations with Gaurav on 15.08.2010.

9. Medical evidence does not corroborate the ocular account of the incident narrated by the victim. PW-8 (Dr.Shimpi Goel) proved the MLC (Ex.PW-8/A) prepared by Dr.Shweta Aggarwal. As per examination, hymen was found torn, posterior lateral (old tear); no evidence of any external injury visible; neither any scratch over genital area or other body parts was found. There was no bleeding and discharge per vagina. As per vaginal examination, the patient was allowing examination by two fingers. Had there been physical relations with the prosecutrix against her wishes forcibly, there was every possibility of the prosecutrix to have struggle marks over her body including private parts. The examining doctor did not opine if hymen torn was fresh.

10. FSL reports (Ex.PY &Ex.PY1) also do not corroborate victim's version. As per FSL reports, no semen could be detected on Ex.'1a' (Nail clippings); Ex.'1b' (Public hair); Ex.'1d' (vaginal swab); Ex.'1e' (vaginal smear); Ex.'1i' (salwar); Ex.'3c' (combed pubic hair); Ex.'3d' (plucked pubic hair); Ex.'3e' (plucked scalp hair); Ex.'3f' (cut scalp hair); Ex.'3g' (underwear); Ex.'3h' (banian); Ex.'3i' (smegmal slide), and Ex.'5' (bedsheet). Blood also could not be detected on Ex.'1a' (Nail clippings); Ex.'1b' (Public hair); Ex.'1d' (vaginal swab); Ex.'1f' (cervical swab); Ex.'3c' (combed pubic hair); Ex.'3d' (plucked pubic hair); Ex.'3e' (plucked scalp hair); Ex.'3f' (cut scalp hair); Ex.'3g' (underwear); Ex.'3h' (banian), and Ex.'5' (bedsheet). Human semen was detected on Ex.'1f' (cervical swab); Ex.'1g' (cervical smear), and Ex.'1h' (underwear). However, the result regarding 'ABO' grouping was inconclusive. The prosecution was unable to establish that semen detected on these exhibits was that of the

appellant. No human semen was found on the victim's clothes or the articles recovered from the house.

11. In the complaint (Ex.PW1/A), 'X' disclosed that her father had gone at 7.30 a.m. at Rithala Metro Station to see off her mother and brother and returned at around 10.00 p.m. In the Court statement, she deviated from the said version and disclosed that her father had returned on his bike when the appellant was inside the house and on hearing the sound of the engine the appellant had fled the spot through staircase. Her father came and stopped in front of the house but went away from there. PW-2 (Ravinder Kumar Sharma), 'X's father, disclosed that he had returned to the house at around 12.00 noon after seeing off her wife and son at Rithala Metro Station. He, however, did not enter inside the house; he had seen her daughter 'X' washing clothes. The gate of the house was open. Telling 'X' that he had some urgent piece of work at Krishan Vihar, he had gone from outside. Apparently, 'X's father had arrived at the spot at the time when the prosecutrix was allegedly ravished. However, she did not inform her father about the occurrence. It is unclear as to who had opened the door of the house when allegedly it was bolted by the appellant before committing the crime. The prosecutrix seems to have assisted the culprit to escape from the spot through the roof on arrival of her father. 'X' did not give any plausible explanation as to why she did not apprise her father about the occurrence when allegedly the appellant had fled the spot after committing the crime on hearing the sound of her father's bike. This infirmity has remained unexplained.

12. Nothing is on record to infer if any hue and cry or alarm was raised by the prosecutrix at the time of commission of the crime or soon

after the departure of the perpetrator of the crime. The prosecutrix did not exhibit abnormal behaviour and pretended as if nothing had happened till 10.30 p.m. During this period, she did not inform any of her family members or relatives. She did not bother to contact her father/uncle/‘Bua’ or any other relation on phone or otherwise during this period.

13. There is some controversy over the exact age of the prosecutrix. Though her date of birth has been recorded as 03.07.1996 in school records, however, it is not based upon any birth certificate. PW-10 (Suman Lata), Vice Principal, GGSS Avantika, Sector-1, Rohini, brought the summoned record regarding ‘X’s admission in their school on 28.03.2006 in class 6th H vide admission No.4518. She was admitted on the basis of School Leaving Certificate issued by the previous school (Ex.PW-10/B). The prosecution did not examine any witness from MC Primary Balika Vidyalya, Budh Vihar, Phase-I where the prosecutrix had studied before taking admission in GGSS Avantika School. It has not been explained as to on what material or basis ‘X’s date of birth was recorded in the said previous school. Since no other cogent evidence has surfaced, the Trial court did not commit any fault to record that the prosecutrix was below 16 years on the day of incident.

14. Considering the materials on record, as discussed above, the possibility of physical relations with consent (though inconsequential) cannot be ruled out. No explicit reliance can be placed on the testimony of the prosecutrix to base conviction.

15. In ‘*Sadashiv Ramrao Hadbe vs. State of Maharashtra & Anr.*’, 2006 (10) SCC 92, the Apex Court while reiterating that in a rape case, the accused could be convicted on the sole testimony of the prosecutrix if it is

capable of inspiring the confidence in the mind of the Court, put a word of caution that the Court should be extremely careful while accepting the testimony when the entire case is improbable and unlikely to have happened. This is what has been stated :

“It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.”

16. In *Abbas Ahmed Choudhury v. State of Assam* (2010) 12 SCC 115, observing that a case of sexual assault has to be proved beyond reasonable doubt as any other case and that there is no presumption that a prosecutrix would always tell the entire story truthfully, the Hon'ble Supreme Court held:-

“Though the statement of prosecutrix must be given prime consideration, at the same time, broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there could be no presumption that a prosecutrix would always tell the entire story truthfully. In the instant case, not only the testimony of the victim woman is highly disputed and unreliable, her testimony has been thoroughly demolished by the deposition of DW-1.

17. In *Rai Sandeep @ Deepu vs. State of NCT of Delhi*, (2012) 8 SCC 21, the Supreme Court commented about the quality of the sole testimony of the prosecutrix which could be made basis to convict the accused. It held :-

“In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as

all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

18. In *Tameezuddin @ Tammu v. State (NCT of Delhi)*, (2009) 15 SCC 566, the Supreme Court held :-

'It is true that in a case of rape the evidence of the Prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter.'

19. In the light of the above discussion, the appeal is allowed and the conviction and sentence recorded by the Trial Court are set aside. The appellant shall be released forthwith if not required to be detained in any other case. Trial Court record be sent back forthwith. A copy of the order be sent to the Superintendent Jail for information.

**(S.P.GARG)
JUDGE**

MAY 13, 2016

tr/sa